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In The

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., DELAWARE WOMEN'S HEALTH ORGANIZATION, and SUMMIT WOMEN'S HEALTH ORGANIZATION,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS JOSEPH M. SCHEIDLER, ANDREW SCHOLBERG, AND THE PRO-LIFE ACTION LEAGUE, INC.

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QUESTIONS PRESENTED FOR REVIEW

Various organizations sought a nation-wide injunction and damages against persons and organizations who engaged in political and social protests, including alleged acts of trespass and vandalism, against abortion and abortion clinics. The National Organization for Women (NOW) based its claim on the Sherman and Clayton Acts, 15 U.S.C. §§1, 26, while two abortion clinics brought claims under the Sherman and Clayton Acts, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962, and pendent state claims. For almost five years, Plaintiffs engaged in voluminous discovery and ultimately filed First and Second Amended Complaints as well as a RICO Case Statement. The District Court then dismissed the Complaint. The Court of Appeals affirmed. This Court granted the Petition for Certiorari limited to RICO. Restated, the issues are:

1. Was the Second Amended RICO Complaint, alleging extortion against protestors, properly dismissed, where the designated "enterprise" and the alleged "racketeering activity" had a political or social, but not a commercial, dimension?

2. Was the Complaint properly dismissed after nearly five years of litigation and discovery, where the Complaint and the RICO Case Statement showed that a RICO claim or conspiracy had not been specifically alleged?

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3. Was the Complaint properly dismissed, where Petitioners lacked standing to pursue their RICO claims against Respondents and failed to allege Hobbs Act extortion or any other predicate acts under RICO?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in pertinent part, provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 U.S.C. §1961(3) provides:

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

Other statutory provisions are reproduced in Petitioners' Brief (Pet. Br. at 1-3).

STATEMENT OF THE CASE

1. In 1985, Respondent Joseph Scheidler, the founder of the Pro-Life Action League, published *Closed: 99 Ways to Stop Abortion* ("Closed").[1] *Closed* is the centerpiece of this litigation. In it, Scheidler vigorously advocated "a collection of methods that can be used, and that have been used successfully, to stop abortions." *Id.* at 17. They included such constitutionally protected methods as demonstrations and picketing. In chapter 81, entitled "Violence: Why it won't work," Scheidler, with equal vigor, opposed violence – defined as "a direct, physical attack on some type of facility or the personnel who work there." *Id.* at 277. He opposed it on grounds of principle and prudence:

> All of the activist pro-lifers the Pro-Life Action League works with concur with the League's position against violence and its program of *non-violent direct action*. * * * The use of violence could damage the reputation of pro-life activists, while undermining traditional non-violent methods. The

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[1] Copies of *Closed* have been lodged with the Clerk. The book is referred to in the Complaint (¶¶28-29, 77) and in the RICO Case Statement (¶6 (2); J.A. 103), and it was made part of the Record (R.109, Exhibit).

> use of violence might reinforce the erroneous belief that the end justifies the means, and that evil can be overcome by evil. *Id.* at 278 (emphasis in original).

Scheidler acknowledged that he had contacted individuals who had been implicated in violence against abortion clinics, yet he wrote that "we advise pro-lifers not to resort to violent tactics, but to save lives and stop abortions through non-violent direct action. * * * [W]e plan to win without resorting to violence." *Id.* at 279.[2]

2. In June, 1986, Petitioners filed a Complaint under the antitrust laws (Sherman Act, 15 U.S.C. §1, and the Clayton Act, 15 U.S.C. §26) in the District of Delaware against Respondents and other Defendants (No. 86 C 263).[3] The suit was voluntarily dismissed. Petitioners refiled their Complaint in the Northern District of Illinois on October 17, 1986 (No. 86 C 7888). Petitioners sought nation-wide declaratory and injunctive relief. No class was certified (R.61, 73, 76). Motions to dismiss were filed and denied (R.42).

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[2] *See generally*, I W. *Blackstone, Commentaries on the Laws of England* 125 (1765) (natural rights basis of right to life); S. Oates, *Let the Trumpet Sound: The Life of Martin Luther King, Jr.* 216 (1985) (purpose of direct action).

[3] Plaintiffs originally included NOW, the Delaware Women's Health Organization ("DWHO") and the Ladies Center of Pensacola. The Ladies Center was dismissed from the case. Petitioner Summit Women's Health Organization ("SWHO") was added in the First Amended Complaint. For purposes of brevity, Respondents refer to Plaintiffs as "Petitioners" throughout this Brief.

Joseph Scheidler and the Pro-Life Action League, Inc., were among the original Defendants. Timothy Murphy and Andrew Scholberg were added as Defendants in amended Complaints. For purposes of brevity, "Respondents" refers to Joseph Scheidler, the Prolife Action League, Inc., and Andrew Scholberg, unless otherwise specifically indicated. The Pro-Life Action League, Inc., has no parent company or subsidiary.

Certain defendants, including John Ryan and the Pro-Life Direct Action League, were named as defendants only in the antitrust count and will not be filing briefs in this Court due to the limited grant of certiorari.

3. For several years, Petitioners pursued discovery nation-wide, reviewing tapes, files, and correspondence of Respondents and others. Depositions were taken in cities across the country – Chicago, Illinois, Fargo, North Dakota, Fort Wayne, Indiana, St. Louis, Missouri, Durham, North Carolina, Jacksonville, Florida, and Washington, D.C. At least thirteen depositions, including those of Joseph Scheidler, Timothy Murphy, Andrew Scholberg, Randall Terry, Monica Migliorino, Conrad Wojnar, and John Ryan, were taken either before Petitioners filed their Second Amended Complaint in September, 1989, (R.236) or before they filed their RICO Case Statement in March, 1991 (R.469).

4. Petitioners filed a First Amended Complaint on February 2, 1989, which added alleged violations of RICO, 18 U.S.C. §1962, and prayers for treble damages (R.155). The First Amended Complaint also added defendants, including Terry, Scholberg, Murphy, and Vital-Med Laboratories, new conspiracies, and three pendent state theories of recovery. The conspiracy allegations were so broadly drawn that Petitioners later claimed that they embraced hundreds or thousands of co-conspirators (¶3; J.A. 89).

5. Petitioners filed a Second Amended Complaint on September 22, 1989 ("Complaint") (R.236). Petitioners alleged that Respondents conspired to "drive every clinic in the United States . . . out of business" (¶26) and that they had engaged in "unlawful, concerted action, including repeated acts of trespass, extortion and vandalism directed at women's health centers. . . . " (¶27). They also alleged that Respondents and other Defendants, and one or more employees of Defendant Vital-Med, "conspired to steal fetal remains located in Vital-Med's research laboratory in Northbrook, Illinois," (¶64) stole some 4,000 specimens over a period of 10 months, and conspired to "use the specimens as part of their drive to disrupt the operations of health clinics generally" (*id.*) through a media campaign. Among these alleged uses were "actions designed to intimidate and harass clinics by focusing attention on the stolen specimens," (¶37) including "highly publicized" funeral masses and burials (¶ 0). Petitioners alleged that the purpose of Respondents' actions

was "to force all clinics that perform abortions out of business and to eliminate the choice of abortion for women who are pregnant." (¶85) Petitioners asked for declaratory relief against Respondents who were alleged to "have violated the rights of" the clinics and their patients to be free of restraints of trade, and for injunctive relief to prohibit Respondents from "carrying out a concerted effort to drive women's health centers . . . out of business" and "using unlawful means to drive women's health centers . . . out of business." (¶93)[4]

6. The Complaint and RICO Case Statement make allegations of trespass, disorderly conduct, and arrests for such conduct, against Scheidler (¶¶46,60; J.A. 51, 56, 131, 146), Murphy (¶55; J.A. 126-30), and Scholberg (¶60; J.A. 148-152). Beyond that, the Complaint alleges that Scheidler

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[4] Petitioners and their Amici also make reference to "terrorism" (Pet. Br. 3, 7, 8, 9, 25, 27, and 34) and "murder" (*id.* at 5 n.3 and 9; Amicus Br. of State of New York, et al., 9 n.19). The record, however, contains no support for such epithets or arguments rooted in guilt by association. The "murder" is not only outside the record, but also unrelated to Respondents.

If, as Petitioners contend (Pet. Br. 5 n.3), Respondents must take responsibility, based on their pro-life stance, for the death of Dr. David Gunn, then Charles Evers who participated in the civil rights boycott that this Court reviewed in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), was responsible for the shots that were fired at houses, the brick that was thrown through the windshield, the slashed tires, and the threatening phone call. *Id.* at 904-05. Neither vicarious attribution of responsibility is appropriate. *Id.* at 908 (right to associate not lost because other members of group engage in unprotected conduct); *Scales v. United States*, 367 U.S. 203, 224-29 (1961) ("guilt is personal"); *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) ("not responsible for acts of . . . [RICO] co-conspirators . . . beyond the [agreed] goals"). Finally, no facts well-pled in the Second Amended Complaint or set out in the RICO Case Statement warrant linking these Respondents to "arson," "kidnapping" or "firebombing," as Petitioner's argue (Pet. Br. 4, 6, and 32). Conclusory allegations of conspiracy are insufficient. *See, e.g., Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25-26 & n.4 (2d Cir. 1990). Accordingly, this appeal is about social and political protest – it is not about "terrorism," "murder," "arson," "kidnapping" or "firebombing."

in April, 1986 conspired to steal, store, and ship "fetal remains" from Respondent Vital Med (¶¶37,64, 98(j)). The RICO Case Statement makes conclusory allegations that Scheidler "[c]onspired with others to firebomb clinics" in Anaheim, California in June, 1980 (J.A. 138) and "conspired" to enter a Pensacola Clinic in March, 1986, in which he intended to "destroy equipment" (J.A. 142), and for which he was allegedly arrested for "burglary." Other individuals are named, not in the Complaint, but in Exhibit B of the RICO Case Statement, as "co-conspirators," who allegedly participated in "arson," "kidnapping," and "firebombing." (J.A. 161-64, 166, 169, 171-72). No facts, however, are set out that show that these individuals acted in concert with Respondents.

7. Count I was an antitrust claim. NOW was only an antitrust Plaintiff. Count II was a RICO §1962(a) claim. The RICO claim was brought by the abortion clinics – DWHO and SWHO – as class actions. Petitioners alleged that Respondents formed enterprises "with common purposes, including driving all clinics that provide abortion services out of business" (¶¶95-96). The RICO predicate act alleged was Hobbs Act extortion (18 U.S.C. §1951). The Complaint described the "extortion" as follows:

> Defendants conspired to, attempted to or did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics *to give up* their jobs; doctors involved with affected clinics *to give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics *to give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics *to give up* their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force.

¶97 (emphasis supplied). *See also* ¶98. Petitioners made no allegations that any Defendant, or any co-conspirator factually linked to a Respondent, obtained, or attempted to obtain, any property from any clinic, doctor, or patient.

8. Counts III and IV were RICO Section 1962(c) and (d) claims. Petitioners alleged that Respondents were associated with one of the enterprises, Pro-Life Action Network ("PLAN"), and "participated in PLAN's affairs through a pattern of racketeering activity" (¶109), *i.e.*, the Hobbs Act extortion alleged in ¶¶97-98. Petitioners alleged that Respondents conspired to "use the income they received from a pattern of racketeering activity . . . to establish or operate PLAN" and "agreed to the commission of the extortionate acts from which the above-mentioned income would derive" (¶112). The remaining counts alleged state theories.

9. On August 29, 1990, Respondents filed a Motion to Dismiss the Second Amended Complaint under Fed. Rules of Civ. Pro. ("FRCP") Rule 12(b)(6) or, in the alternative, for a more definite statement under FRCP 12(e) (R.335). Respondents also made a motion to require Petitioners to file a RICO Case Statement under FRCP 16 (R.360).

10. On February 4, 1991, the District Court ordered Petitioners to file a RICO Case Statement, which had to "include the facts the plaintiffs [were] relying upon to initiate each RICO claim as a result of the 'reasonable inquiry' required by Fed. R. Civ. P. 11" (introductory ¶; J.A. 82; R.430).

11. On March 18, 1991, Petitioners filed their RICO Case Statement. While the Complaint alleged acts of trespass, vandalism, assault, battery, and theft by Respondents, other Defendants, or unnamed co-conspirators (¶¶2, 27, 42, 46-47, 49-50, 61, 64, 67, 74, 97-98), it did not refer to "bombing" or "arson" by any Respondent, other Defendants, or their "co-conspirators." Only in the RICO Case Statement, filed eighteen months after the Second Amended Complaint, does a reference to alleged acts of "bombing" or "arson" first appear, and the reference indicates that they are allegedly part of "the pattern of extortionate acts." (¶2; J.A. 88). Nevertheless, Petitioner did not "list the specific [federal or state extortion, bombing, or arson] statutes which were allegedly violated,"

as required by the Order of February 4, 1991.[5] Instead, Petitioners characterized these acts as "violat[ions] of the Hobbs Act, 18 U.S.C. §1951." (¶¶5(a), (p), J.A. 91, 95-97)[6] The Complaint and the RICO Case Statement, however, are barren of facts that "state in detail and with specificity" what the plaintiffs "reli[ed] upon to initiate" their "RICO claim" or show conduct by any Respondent of "bombing" or "arson" or their agreement to such acts as part of a conspiracy, as required by the Order of February 4, 1991.

12. On May 28, 1991, the District Court granted Respondents' Motion to Dismiss, holding that Petitioners failed to state a claim under either the antitrust laws or RICO. 765 F. Supp. 937, 941. Petitioners did not seek to open the judgment under FRCP 59(e) or 60(b) to request leave to amend under FRCP 15(a) after their action was dismissed to cure any possible defect in their Complaint, including a failure to allege an economic dimension or additional "racketeering activity" beyond "extortion." Instead, Petitioners, standing on their Complaint, appealed the dismissal.

13. The Court of Appeals affirmed. 968 F.2d 612. Petitioners' petition for rehearing was denied. (Pet.App. G-2) Petitioners filed a petition for certiorari on November 2, 1992. On June 14, 1993, this Court granted certiorari limited to Question 1 (the RICO question). 113 S.Ct. 2958 (1993).

SUMMARY OF THE ARGUMENT

Contrary to our nation's fundamental commitment to the freedoms protected by the First Amendment, this litigation was designed to gain a federal forum to bankrupt a nation-

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[5] Under federal law, "bombing" or "arson" are not "racketeering activity" under 18 U.S.C. §1961. "Arson" in violation of state law is a "racketeering activity." *Id.* "Bombing" is also not a predicate state offense under "racketeering activity." *Id.*

[6] The Government's suggestion that Petitioners pled "arson" or "bombing" as independent predicate acts (Gov. Br. 3, 21-22) misreads the District Court's Order of February 4, 1991, and the RICO Case Statement.

wide movement of political and social protest. With the Founders, Respondents believe that "a function of free speech . . . is to invite dispute," that it "may indeed best serve its high purpose, when it induces a condition of unrest . . . or even stirs people to anger," (*Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965)), and that, from the beginning, this nation has espoused a "profound national commitment . . . that debate on public issues should be uninhibited, robust and wide open" (*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Respondents' principles are rooted in the natural rights tradition of the Common Law: "Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb" (1 *Blackstone* 125). Respondents' principles also reflect the strategy of Dr. Martin Luther King, Jr.: "The purpose of direct action is to create such a crisis and foster such a tension that a community . . . is forced to confront the issue." (*Let the Trumpet Sound* 216).

This litigation has dragged on for seven years because Petitioners legally crafted an unparalleled theory of "extortion": all routine political or social protest that happens to be aimed at a business is "extortion" because it influences the operation of the business or the conduct of consumers. If businesses sell less, if consumers buy less, or if fewer employers are employed, that is "extortion" of each of them. The "extortionists" need not *obtain* anything, as in common law "extortion" – it is sufficient if the businesses, consumers, or employees "give up" something.

Not only do Petitioners seek to rewrite the jurisprudence of "extortion," they also seek to expand a federal statute – RICO – aimed at the commercial activity of organized crime and white-collar crime, and to use it as a hammer to suppress political and social protest. Ingeniously encompassing any activity that threatens to depreciate business, whether the activity is legal or illegal under any state or federal law, this unprecedented theory of RICO liability profoundly offends the values embodied in the First Amendment. Accordingly, this Court ought to reject it.

Beyond its broadly offensive character under the First Amendment, the background against which this appeal must be evaluated, this litigation suffers from four specific, legal defects, which justified its dismissal below and warrant affirmance now:

First, Petitioners complain of political and social protest; they do not allege the commercial dimension of Petitioners' conduct required by RICO under the *Ivic-Bagaric* rule. The requirement of a commercial dimension – personal gain to the offender rather than loss to the alleged victim – pervades RICO, its title, findings and purposes, definitions, prohibitions, criminal penalties, civil remedies, and liberal construction directive. The legislative history confirms the statute's plain language. In formulating RICO in the 1960's, the statute's sponsors consciously focused it on the commercial activity of organized crime and white-collar crime and specifically sought to exclude any First Amendment implications, including guilt by association and its application to political or social protest. In light of the ongoing anti-war protests, during the shepherding of RICO through Congress in 1969-1970, its sponsors took every opportunity to preclude its application to political or social protest. RICO, too, is *in pari materia* with the antitrust laws. Accordingly, the exclusion of political and social activity from the antitrust laws applies as well to RICO. Petitioners' theory of statutory interpretation, therefore, is like their theory of liability – unprecedented in this Court's jurisprudence. No text can or ought to be read divorced from its context. Statutory interpretation is "a holistic endeavor." *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2182 (1993) (quoting *United Saving Ass'n of Texas v. Timber of Inwood Forest Associates Ltd.*, 484 U.S. 365, 371 (1988)).

The commercial dimension requirement is settled law in two circuits and has been applied without difficulty for the past decade. Any reinterpretation now of RICO, adopted in 1970 when the text of legislation was routinely read in light of its legislative history, to eliminate the requirement of a commercial dimension would be tantamount to retroactive legislation.

The Department of Justice's participation in this appeal is difficult to square with its testimony before Congress in 1985, 1988 and 1989 that it had achieved unprecedented success with RICO against domestic terrorists and that it could not actively support legislation to eliminate the commercial gain requirement of *Ivic-Bagaric*. Likewise, in 1993, the Attorney General told Congress, while the Department was drafting its brief at the certiorari stage in this case, that *new* legislation was needed to stop clinic protests because Justice could not identify any other federal law that would be generally applicable and existing federal law is inadequate. In fact, during the past two decades, RICO (as well as many other federal laws) has been effectively used against domestic terrorism, notwithstanding the *Ivic-Bagaric* rule. Unable to cite one instance where any prosecution was thwarted because of it, the Government is reduced to offering little more than conclusory rhetoric.

Second, Petitioners allege one, and only one, RICO predicate act – Hobbs Act extortion. Yet, their rootless theory of "extortion" cannot be transplanted into the jurisprudence of extortion in the Hobbs Act, which incorporates basic common law concepts. Extortion, a larceny-type offense, requires "the obtaining of property from another. . . . " "Obtaining" does not mean "depriving." In fact, Petitioners never alleged that any Respondent obtained any property from any Petitioner. It is contradictory, in short, for Petitioners to allege both that Respondents *obtained* "property" – the right to do abortions, have abortions, or run an abortion clinic – and that Respondents' political and social objective was to *stop* such activities completely.

While Petitioners now insinuate "arson and bombing" in this Court, they never saw fit to allege them as predicate acts under RICO. Not a word of "arson" or "bombing" is found in the First, First Amended, or Second Amended Complaints. The RICO Case Statement, to be sure, refers, generically, to "bombing" and "arson," but it does not specify any state or federal statutory provision other than "extortion." "Bombing" and "arson" are merely referenced as "extortionate acts."

Third, because of the overriding First Amendment implications of the broad range of political activities chilled by

their open-ended claim, aggravated by their conclusory labeling of all pro-life protestors as "conspirators," Petitioners had a duty of heightened specificity in their pleading and in their assertions of fact in their RICO Case Statement. More decisively, the highest degree of specificity could not avoid the collision, as a matter of law, between the First Amendment and Petitioners' claim that depreciating an industry's business through conspiratorial protest activity constitutes "extortion."

Fourth, Petitioners lack standing to bring this case or pursue this appeal. DWHO and SWHO, the only two RICO plaintiffs, do not allege direct injury, cognizable under RICO, to themselves from Respondents' conduct, *i.e.*, an injury proximately caused by "racketeering activity" to their business or property. Instead, they allege that protests at *other* clinics in the nation caused them injury. Accordingly, they do not allege "extortion" under RICO by Respondents that proximately caused injury to their business or property.

Finally, none of these fatal defects can be rectified by Petitioners in this Court because the rules of civil procedure simply do not allow it. Petitioners filed their Second Amended Complaint after 35 months of litigation and discovery and their RICO Case Statement after 53 months. They spurned every opportunity to amend their Second Amended Complaint at all stages of this case or to seek additional discovery. The District Court's RICO Case Order, serving the function of a more particular statement under FRCP 12(e) and to control litigation under FRCP 16, put them on final notice that specification of their RICO claim was required. After the District Court dismissed the litigation in its entirety, Petitioners were required to seek to open the judgment under FRCP 59(e) or 60(b) and ask for leave under FRCP 15(a), if they wanted to amend for any purpose. They failed to do so. Instead, standing on their Complaint, they appealed. Moreover, when Petitioners submitted their RICO Case Statement that relied on deposition testimony and trial testimony as well as discovery documents, the District Court was entirely justified, in the alternative, in treating the motion as one for

summary judgment under FRCP 56 and dismissing the case with prejudice.

This litigation should come to an end.

ARGUMENT

I. THIS RICO ACTION WAS PROPERLY DISMISSED BECAUSE RESPONDENTS' CONDUCT WAS POLITICAL OR SOCIAL, NOT COMMERCIAL.

Petitioners failed to allege in their Complaint or their RICO Case Statement that Respondents' protests aimed at abortion clinics, had a commercial dimension – gain to Respondents, not loss to Petitioners – beyond its political or social dimensions. Accordingly, the District Court dismissed the Complaint, and the Court of Appeals affirmed. Because RICO requires an economic dimension to the enterprise or the racketeering activity, the judgment below must be affirmed.

A. The text of RICO requires a commercial dimension in the enterprise or the racketeering activity.

The interpretation of RICO must begin with "its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1169 (1993). A commercial dimension pervades the text of RICO – its title, its statement of findings and purpose, its definitions, its prohibitions, its criminal penalties, its civil remedies, and its Liberal Construction Clause.

1. Title

RICO's title, "Racketeer Influenced and Corrupt Organizations Act", suggests its commercial dimension.[7]

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[7] This Court looks to titles to determine the meaning of operative text. *See, e.g., United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804)

"Racketeer" and "corrupt" must be read in their ordinary meaning.[8] XIII *Oxford English Dictionary* 80-81 (2nd ed. 1989) describes the usage of "racketeering" as "extorting money from business firms" or "engag[ing] in [a] fraudulent business."[9] "Corrupt" is described as "perverted from uprightness . . . in discharge of duty; influenced by bribery or the like; venal." *Id.* at 972. These words have meaning and limitations and neither is consonant with political or social protest.

2. Statement of Findings

After almost twenty years of investigations, Congress learned one unquestioned lesson about organized crime: it was about money and power, and any effort to curtail its activities in the market place had to strike at the flow of money into it. Four of RICO's five Statement of Findings, therefore, emphasize the commercial dimension of organized crime: "(1) . . . [It] annually drains billions of dollars from America's economy . . . (2) . . . derives a major portion of its power through money obtained from . . . illegal endeavors . . . (3) this money and power are increasingly used to infiltrate legitimate business . . . [and] (4) . . . [it] weaken[s] the stability of the Nation's economic system. . . . "[10] The fifth addresses defects

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(Marshall, C.J.); *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2183 (1993). *See generally*, Blakey and Gettings, *Racketeer Influenced and Corrupt Organization (RICO): Basic Concepts – Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1025 n.91 (1980) (tracing evolution of RICO's title to reflect the distinction between legitimate and illegitimate organizations) ("Basic Concepts").

[8] *Smith v. United States*, 113 S.Ct. 2050, 2054 (1993); *Russello*, 464 U.S. 16, 21 (1983).

[9] *See also* Blakey, "*The RICO Civil Fraud Action in Context*," 58 Notre Dame L. Rev. 237, 250 n.41 (1982) (tracing history of "racket") ("Civil Action").

[10] 84 Stat. 922-23 (1970). While the Statement of Findings and Purpose prefaces the Organized Crime Control Act, using it to interpret

in the law. 84 Stat. 923 (1970). These findings, in short, have no relevance to political or social protests.

3. Definitions

The operative definitions under RICO set out in 18 U.S.C. §1961 focus on "persons," "enterprises," and "activities" having a commercial or gain dimension. Under RICO, "person" defines who may violate the statute and who may sue under its civil provisions.[11] "Person" in 18 U.S.C. §1961(3) focuses on individuals and entities "capable of holding a legal or beneficial interest in property." A "person" who cannot gain property or a beneficial interest in it is not a "person" within RICO. Under RICO, "enterprise" defines the entities by, through, or against which a "pattern of racketeering activity" may be engaged in.[12] The notion of gain pervades the category. "Enterprise" "may be divided into four broad categories: (1) commercial entities (*e.g.*, corporations, partnerships, sole proprietorships); (2) benevolent organizations (*e.g.*, unions, benefit funds, schools); (3) governmental units (*e.g.*, the office of a governor, a state legislator, a court, a prosecutor's office, a police or sheriff department, or an executive department or agency); or (4) associations in fact (licit or illicit)."[13] Typically, each enterprise will have a commercial dimension, that is, it engages in commercial

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RICO is appropriate, since a comparable Statement of Findings and Purpose prefaced S. 1861, RICO's predecessor. 115 Cong. Rec. 9568 (1969).

[11] 18 U.S.C. §§ 1962, 1964. *See Civil Action* at 290 n.151.

[12] 18 U.S.C. §1961(4). *See generally* Note, *Functions of the RICO Enterprise Concept*, 64 Notre Dame L. Rev. 646 (1989) ("Functions").

Petitioners (Pet. Br. 26-29) and the Government (Gov. Br. 11-15) make much of Judge Friendly's analysis of "enterprise" in subsections (a), (b), and (c), *United States v. Ivic*, 700 F.2d 51, 60-61 (2d Cir. 1983), but they ignore the fact that his analysis was reinterpreted by Judge Kaufman in *United States v. Bagaric*, 706 F.2d 42, 56-57 (2d Cir. 1983), *cert. denied*, 464 U.S. 840 (1983). The rule is not the *Ivic* rule, but the *Ivic-Bagaric* rule. *See* text *infra* at n.25.

[13] *Civil Action* at 290-99 (footnotes omitted).

transactions aimed at direct or indirect gain that could constitute "racketeering activity" under 18 U.S.C. §1961(1), even if the enterprise's purpose may not be commercial or particular conduct associated with it may not be commercial in a particular instance.

Under RICO, the predicate offenses are "racketeering activity." 18 U.S.C. §1961(1). They "may also be grouped into four broad, but not mutually exclusive categories: (1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud."[14] The thrust of these offenses, too, is commercial.

The inclusion of violence or corruption offenses that are not commercial, that is, directly aimed at gain, reflects Congress' recognition of the *instrumental* role these offenses play in the commercial activity of enterprises in the marketplace that are aimed at gain,[15] a point that is underscored by the scope of RICO civil remedies.[16]

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[14] *Civil Action* at 300-306 (footnotes omitted).

[15] For the development of this idea, *see* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* 8 (1967) ("Task Force Report") ("There are at least two aspects of organized crime that characterize it as a unique form of criminal activity . . . corruption [and] enforcement. . . . "); National Commission on Reform of Federal Criminal Laws: *Study Draft of A New Federal Criminal Code* §1005, 68-69 (1970) ("enforcer" and "corrupted public servants"); 115 Cong. Rec. 5873 (1969) (statement of Sen. McClellan) ("Two positions in the organized crime group make it substantially different from other criminal operations: the enforcer and the corruptor."); S. Rep. No. 617, 91st Cong., 1st Sess. 41 (1969) ("the enforcer and the corruptor") ("Senate Report"). Enterprises may play several, but not mutually exclusive, roles in RICO violations: "prize," "instrument," "victim" or "perpetrator." *Civil Action* at 307. A commercial dimension – in the enterprise or the racketeering – must be present no matter what role the enterprise plays.

[16] *See infra* n.17.

4. Prohibitions

Under RICO, the prohibitions of 18 U.S.C. §1962 also reflect its commercial dimension. Section 1962(a) strikes at the use or investment of "*income* derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt" in an "enterprise" that "affect[s] commerce." Section 1962(b) strikes at the acquisition or maintenance "through a pattern of racketeering activity, or through collection of an unlawful debt of an *interest*" in an "enterprise" that "affect[s] commerce." Section 1962(c) strikes at "persons" "employed by or associated with" an "enterprise" that "affect[s] commerce" from conducting its "*affairs*" through a "pattern of racketeering *activity*" or "the collection of unlawful debt." "Income" and "interest", of course, reflect "gain". Two similar words are crucial in the interpretation of Section 1962(c), the provision at issue in this appeal: "activity" and "affairs." I *Oxford English Dictionary* 130 (2nd ed. 1989) describes "activity" as "action." Similarly, "affairs" is generally described as "what has to be done," but its more particular meaning is "commercial or professional business." *Id.* at 209-10. Reading "activity" and "affairs" to mean "act" or "do" makes no sense. If similar words have a similar meaning, different words have a different meaning. *See Reves*, 113 S.Ct. at 1169. When the two words are combined, therefore, they indicate that Section 1962(c) applies to commercial or professional action, not action generally. Section 1962(d) strikes at conspiracy to violate . . . subsections (a), (b), or (c). . . . " Accordingly, Section 1962 reflects "gain" in each of its subsections: Section 1962(a) – the investment or use of "gain" in an enterprise; Section 1962(b) – the acquisition or maintaining of "gain" in an enterprise; Section 1962(c) – conducting the "commercial activity" of an enterprise; and Section 1962(d) – conspiracy to do so.

5. Penalties

RICO's criminal penalties are set out in 18 U.S.C. §1963. While they include traditional penalties, RICO's most

distinctive criminal penalty is its forfeiture of interests acquired or maintained in enterprises operated or conducted in violation of the statute. Thus, RICO's commercial dimension is sharply cast into relief.

6. Remedies

RICO civil remedies are set out in 18 U.S.C. §1964. While they include injunctions, RICO's most distinctive civil remedy is its authorization of treble damages to persons "injured" in their "business or property" by reason of "a violation of section 1962." The instrumental character of the inclusion of violence and corruption in the predicate offenses is, therefore, sharply brought out by the failure of Section 1964 to authorize recovery of damages for personal injury.[17]

7. Liberal Construction Clause

RICO's Liberal Construction Clause is consistent with this analysis. It mandates liberal construction to "effectuate . . . [RICO's] remedial purposes." 84 Stat. 947 (1970). Those purposes must first be determined before its text may be liberally construed. *Reves*, 113 S.Ct. at 1172 (clause is "not an invitation to apply RICO to new purposes that Congress never intended"). RICO's purpose is protecting the integrity of commercial transactions.[18] Directing RICO away from that dimension, and toward political or social activity, would be inconsistent with its purpose. The Liberal Construction Clause ought not be used to undermine RICO itself.[19]

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[17] *See, e.g., Grogan v. Platt*, 835 F.2d 844, 845-48 (11th Cir.) ("property" does not include economic aspects of murder), *cert. denied*, 488 U.S. 981 (1988).

[18] *See infra* n.116.

[19] *Perrine v. Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850) (Taney, C.J.) ("an interpretation of [a] statute which . . . would render different sections inconsistent with each other cannot be the true one"). *Holmes v. Securities Investor Protection Corporation*, 112 S.Ct. 1311, 1321 (1992); (allowing such suits "would open the door to

8. Decisions of Courts of Appeals

The decisions of the Courts of Appeals, with one exception, reflect this analysis. RICO's commercial dimension was first explicitly recognized in a judicial decision in *United States v. Ivic*,[20] and clarified by *United States v. Bagaric*.[21] The *Ivic-Bagaric* rule is followed by other Circuit Courts of Appeals.[22] The exception is the Third Circuit in *Northeast Women's Center Inc. v. McMonagle*.[23]

In *Ivic*, a prosecution of Croatian nationalists for a conspiracy to kill a Croatian journalist, the Second Circuit dismissed a RICO Section 1962(d) count because the enterprise "was neither claimed nor shown to have any mercenary motive." The goal, political in character, was to advance

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'massive and complex damages litigation [, which would] not only burde[n] the courts, but also undermin[e] the effectiveness of treble-damages suits.' ") (quoting *Associated General Contractors of Cal. Inc. v. Carpenters*, 459 U.S. 519, 545 (1983)).

[20] 700 F.2d 51 (2d Cir. 1983).

[21] 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

[22] The Eighth Circuit's seminal RICO prosecution, which involved bribery of judges, was *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981). The *Anderson* court observed that "enterprise" includes "only an association having an . . . *economic* goal . . . . " *Id.* at 1372 (emphasis supplied). *Anderson*'s dictum became a holding in *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir.) (control of labor unions), *cert. denied*, 488 U.S. 974 (1988). Subsequently, the Eighth Circuit heard *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), which involved the prosecution of a leader of a paramilitary, white supremacist organization (CSA) under RICO for arsons, one of which was an arson fraud. Ellison contended that the Government failed to prove "any connection between one of the two arsons . . . and any interest of CSA as an enterprise." 793 F.2d at 949. The Eighth Circuit held that it was not necessary to prove that the racketeering activity realized gain or "benefitted the enterprise," only that it "*affected* the enterprise." *Id.* at 950 (emphasis in original).

[23] 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

Croatian independence.[24] Judge Friendly's opinion for the Second Circuit carefully analyzed RICO's language, structure, title, findings, origins, and Liberal Construction Clause. In *Bagaric*, Judge Kaufman, writing for a successor panel, held that *Ivic* did not exculpate another group of Croatian nationalists, when their enterprise "perpetrated an . . . extortion scheme . . . . " 706 F.2d at 46, 49. When the *Bagaric* defendants sought to read *Ivic* to require that the "financial motive" be "ultimate and overriding" and "must surmount all others," the *Bagaric* court rejected that construction, properly noting that *Ivic* did not require that "economic *gain* must be the sole motive of every RICO enterprise."[25] *Bagaric* also properly held that the commercial or gain dimension requirement is an "objective characterization" of the enterprise or predicate acts, not a question of proof of state of mind. *Ivic* had referred to "motivated activity," "motive," "motivation," or "purpose." 700 F.2d at 59 n.5, 59, 63, 65. *Bagaric*, however, clarified this "imprecise" use of "motive;" it did not refer to "mens rea," but to an "objective assessment" of "economic dimension." 706 F.2d at 53 n.11. Respondents adopt "dimension" for precision; they also refer to the requirement as the *Ivic-Bagaric* rule. Petitioners' concern ("litigation nightmare" Pet. Br. 38) is obviated by adopting the *Ivic-Bagaric* rule, not their suggested "subjective and

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[24] 700 F.2d at 59. The *Ivic* opinion used "economic," "mercenary," "financial," and "commercial" interchangeably. *Id.* at 59, 59 n.5, 63 and 65. Respondents adopt "commercial," since it was used by RICO's principal sponsor in the Senate. 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan).

[25] *Id.* at 53, 55 (emphasis supplied). Contrary to Petitioners' understanding (Pet. Br. 36), the *Bagaric* court did not conclude that the enterprise before it lacked an "economically-motivated" enterprise. The Court held that the prosecution may show that commercial dimension "through either the enterprise or the predicate acts of racketeering"; it also held that the "core of the enterprise was the commission of more than fifty acts of the classic economic crime of extortion . . . . " *Id.* at 57-58.

dangerous inquiry" into "the ultimate or overriding subjective motivation." (Pet. Br. 38, 41-42). The Government's concerns (Gov. Br. 19-21) are similarly allayed.[26]

The exception to the *Ivic-Bagaric* rule is the Third Circuit in *Northeast Women's Center, Inc. v. McMonagle*,[27] in

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[26] Subsequently, in *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985), which involved armed robberies and murders by the Black Liberation Army, the Second Circuit, following *Ivic* and *Bagaric*, held that all that is necessary is " '*some* financial purpose' . . . *either* to the criminal enterprise or the acts of racketeering," 758 F.2d at 853 (citation omitted; emphasis in original), which was proven by the "economic crime" of robbery. *Id.* at 833.

The Second Circuit's decade-long application of the *Ivic-Bagaric* rule has not prevented the Government from effectively prosecuting terrorism under RICO or other federal statutes. In *Ivic*, the defendants were convicted under other federal statutes. 700 F.2d at 56. The *Bagaric* defendants were convicted under RICO. Most recently, the suspects in the World Trade Center bombing were indicted under 13 other federal statutes. *United States v. Rahman*, S3 93 Cr. 181 (MBM) (S.D. N.Y. 1993).

The advocacy of the Department's lawyers in this appeal (Gov. Br. 2) ("impair . . . ability to prosecute acts of terrorism") cannot be squared with their testimony before Congress. In 1985, the Department of Justice told Congress that RICO is "an effective tool against domestic terrorism . . . ." *Oversight on Civil RICO Suits*, Hearings before the Senate Judiciary Comm., 99th Cong., 1st Sess. 96 (1985) (statement of Ass. Att'y Gen. Stephen Trott) ("Oversight: 1985") *See also Racketeer Influenced and Corrupt Organization Reform Act*, Hearings before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 37-42 (1989) (statement of Dep. Ass. Att'y Gen. John C. Keeney) ("achieved unprecedented success against organized crime . . . and [other] serious criminal activity [including] . . . neo-Nazi terrorists.") ("Reform Act 1989"). Indeed, when legislation was proposed to change the *Ivic-Bargaric* rule, the Department thought it was hardly necessary. *RICO Reform*, Hearings before the House Subcomm. on Crim. Justice, 100th Cong., 1st and 2nd Sess. 630 (1988) ("not actively support" change) (statement of Dep. Ass. Att'y Gen. John C. Keeney) ("RICO Reform 1988").

[27] 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989).

which it held that "economic motivation" was not required.[28] Its abbreviated holding, unaccompanied by analysis, is, for that reason alone, unpersuasive.[29]

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[28] *Id.* at 1349 n.7. The Third Circuit also held that "extortion" under 18 U.S.C. §1951 did not require the "obtaining of property." *Id.* at 1349-50.

[29] Petitioners wrongly contend that "most of the circuit courts of appeals have held defendants liable under RICO despite the absence of economically-motivated enterprises or acts." Pet. Br. 36-37. In seven of the nine cases cited, the commercial dimension issue was not addressed by the courts, since it was obviously present. The enterprise in *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1988), *cert. denied*, 488 U.S. 866 (1988), engaged in financially motivated predicate acts – armed robbery, counterfeiting, bank robbery, armored car robbery – and proceeds went to participants in the enterprise or to the enterprise. *Id.* at 1527, 1544. In *United States v. Ellison*, 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986), the Eighth Circuit observed: "The arson of Ellison's sister's house enabled her, a former member, to *gain* financially . . . . " 793 F.2d at 950 (emphasis supplied). The CSA also engaged in thefts "intended to produce operating funds." *Id.* at 945, 950. *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986), involved bribery, mail fraud, and "kickback schemes in exchange for judicial favors." 777 F.2d at 1107. *United States v. Dickens*, 695 F.2d 765 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983), involved "17 robberies committed . . . to finance the purposes and aims of the 'New World' . . . . " 695 F.2d at 769, 771. *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980), involved bribery and obstruction of law enforcement "with the intent to facilitate an illegal gambling business" under 18 U.S.C. §1511. *Id.* at 6 n.1, 7 & n.4. *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), involved bribes from businesses. *Id.* at 684. Finally, Petitioners cite *Bagaric* itself, which explicitly addressed and reaffirmed the economic dimension or gain requirement as an element of RICO. *Id.* at 57 & n.13, 58.

That leaves two cases relied on by Petitioners – *McMonagle* and *Feminist Women's Health Center v. Roberts*, No. C86-161, 1989 WL 56017. *Roberts*, a District Court decision, relied on *McMonagle*. In any case, *Roberts* is on appeal in the Ninth Circuit, which withdrew its submission pending this Court's decision. *Feminist Women's Health Center v. Codispoti*, No. 90-3526 (July 27, 1993). *See also United States v. Freeman*, Nos. 92-10094, 92-10102 (9th Cir. Sept. 22, 1993) (adopting *Ivic*, holding "that the economic motive of the predicate acts [bribery] is sufficient to uphold a RICO conviction").

B. RICO's legislative history confirms RICO's exclusively commercial dimension.

When statutory language, syntax, or context – internal or external – is ambiguous,[30] resort to legislative history is proper.[31] Ultimately, however, the interpretation of a statute is "a holistic endeavor."[32]

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[30] The Government's suggestion that "there can be no claim that . . . [RICO] is ambiguous" (Gov. Br. 18) is bad semantics and bad law. Ambiguity is of three types: semantic, syntactical, and contextual. R. Dickerson, *The Fundamentals of Legal Drafting* 25-27, 32 (1965) ("[T]he most troublesome [ambiguity is] contextual ambiguity [either internal or external, that is,] the uncertainty of whether a particular implication arises. * * * [I]t is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication. Implication is merely the meaning that context adds to express (dictionary) meaning.") *See United States v. Monia*, 317 U.S. 424, 432 (1943) ("A statute . . . cannot be severed [from its context] without being mutilated. * * * The meaning of a statute cannot be gained by confining inquiry within its four corners.") (Frankfurter, J. in dissent); *Duparquet Huot & Moncuse Co. v. Evans*, 297 U.S. 216, 220-21 (1936) ("[H]istory is a teacher that is not to be ignored.") (Cardozo, J.).

[31] This Court routinely looks to the legislative history of RICO in interpreting the statute. *United States v. Turkette* 452 U.S. 576, 586, 589 (1981); *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 486, 489 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238-41 (1987); *Agency Holding Corp. v. Malley-Duff & Associates Inc.*, 483 U.S. 143, 151 (1987); *United States v. Monsanto*, 491 U.S. 600, 613 (1989); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236-39 (1989); *Tafflin v. Levitt*, 493 U.S. 455, 461 (1990); *Holmes v. Securities Investor Protection Corporation*, 112 S.Ct. 1311, 1317 (1992); *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1170-72 (1993).

[32] *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2182 (1993) (quoting *United Saving Ass'n of Texas v. Timber of Inwood Forest Associates Ltd.*, 484 U.S. 365, 371 (1988)).

It is argued that legislation should be principally read with reference to its operative text. As a rule of statutory construction to be applied to legislation enacted by Congress *after* a certain date, this position would

The key to understanding RICO's legislative history lies in the evolution of "enterprise criminality," which, in turn, evolved against the backdrop of the Communist Party membership prosecutions in the 1950's and the Vietnam anti-war protests prosecutions in 1969-70. Nevertheless, RICO's commercial dimension may be best understood by examining the principle of selection by which RICO's sponsors *included* and *excluded* the federal and state predicate offenses in RICO.[33] This history demonstrates that RICO's sponsors consciously focused RICO on the commercial activity – the acquisition of gain, not the infliction of loss – of organized crime as well as

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have much to recommend it, but as a rule of statutory construction to be applied to statutes enacted by the Congress *before* that date and *under a contrary rule of statutory construction*, this position is open to the strictures that are leveled against retroactive legislation. *See, e.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring).

"Congress legislates with knowledge of . . . basic rules of statutory construction." *Rowland v. California Men's Colony*, 113 S.Ct. 716, 720 (1993). If those rules envision an examination of legislative history – and such an examination dictates exculpation, but not making such an examination dictates inculpation – changing the rules of statutory interpretation would enlarge the scope of inculpation, contrary to the principle of legality. J. Hall, *General Principles of Criminal Law* 58-64 (2d ed. 1960). As such, statutes ought to be construed in light of the rules of statutory interpretation followed when they were drafted. *Daily Income Fund Inc. v. Fox*, 464 U.S. 523, 536 (1984). In 1970, when RICO was enacted, the practice of this Court was routinely to examine the legislative history of a statute. *See, e.g., Nelson v. George*, 399 U.S. 224, 228 (1970). Indeed, a "Westlaw" search for "legislative history" in the decade before the enactment of the 1970 Act turned up 334 decisions of this Court. Resort to legislative history was routine.

[33] *See generally, Civil Action* at 249-80 (1982); Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 Col. L. Rev. 774, 776-86 (1988) ("Goldsmith"); *Functions* at 647-54. For a statement of the rationale of the Organized Crime Act itself, *see* McClellan, *The Organized Crime Control Act (S.30) or Its critics: Which Threatens Civil Liberties?* 46 Notre Dame L. Rev. 57 (1970) ("McClellan") (with G. Robert Blakey and Russell Coombs).

white-collar crime and that they took every opportunity to preclude its application to political or social protest.

1. Congress focused on organized crime in the market place.

Following the Attorney General's 1950 Conference on Organized Crime, the Kefauver Committee investigated organized crime and noted its infiltration into legitimate business.[34] Following the Kefauver Committee's work, Senator John L. McClellan, the chairman of a number of key committees and subcommittees and subsequently one of the principal sponsors of RICO, chaired three investigations into the illegal activities of organized crime, focusing on labor racketeering, gambling, and narcotics.[35] These investigations examined illicit enterprises and the infiltration of organized crime into businesses as well as unions. Following these investigations, the President's Commission on Law Enforcement and Administration of Justice undertook an examination of organized crime; it focused on "enterprise criminality."[36] RICO's two track – criminal and civil – approach to "enterprise criminality" in the marketplace grew out of the Commission's findings and recommendations.

From 1967 to 1969, Senator McClellan and Senator Roman L. Hruska, another key Senate sponsor of RICO, also served on the National Commission on Reform of the Federal Criminal Laws. It, too, examined federal criminal law and the

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[34] *See Basic Concepts* at 1014 n.21 (reports cited).

[35] *See Id.* at 1015 nn. 22, 23 (reports cited).

[36] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 187-210 (1967) ("Challenge"). "Enterprise criminality" consists of "organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F. 2d 1322, 1330 (5th Cir. 1983) (quoting *Basic Concepts* at 1013-14), *cert. denied*, 465 U.S. 1005 (1984)).

challenge of organized crime.[37] While the Commission considered a proposal on "organized crime leadership," it did not carry it forward in its final report. Nevertheless, the proposal, a predecessor of RICO, is enlightening, since it focused on organized crime, not white-collar crime or political or social protest.[38]

2. S. 2187, the 1965 legislation, was targeted at illicit enterprises.

On the basis of his hearings on organized crime, Senator McClellan introduced his syndicate bill, S. 2187, on June 24, 1965.[39] The bill was targeted at illicit enterprises; it was one of RICO's key precursors. S. 2187 would have outlawed knowingly "becom[ing] a member of (1) the Mafia or (2) any other organization having . . . [as] its purposes" engaging in certain designated offenses. *Id.* at §2(a). S. 2187 was Senator McClellan's first legislative effort to curtail enterprise criminality in the underworld. S. 2187 included among its designated offenses "acts . . . in violation of the criminal laws of the United States or any State, relating to gambling, extortion, blackmail, narcotics, prostitution, and labor racketeering." *Id.*

Testifying before Senator McClellan's Committee, Attorney General Nicholas deB. Katzenbach raised constitutional

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[37] The Commission was created by Act of Nov. 9, 1966, Pub. L. No. 89-801, 80 Stat. 1516 (1966). *See Civil Action* at 47.

[38] National Commission on Reform of Federal Criminal Laws: *Study Draft of a New Federal Criminal Code* §1005 (1970) (defining "criminal syndicate" as "an association of ten or more persons for engaging on a continuing basis in [certain predicate crimes]"). The predicate crimes were those "which experience has shown to be the specialties of the criminal syndicates." *Consultant's Report on Conspiracy and Organized Crime*, I Working Papers: National Commission on Reform of Federal Criminal Laws 381, 383-84 (1970) (Professor G. Robert Blakey).

[39] S. 2187, 89th Cong., 1st Sess. (1965), 111 Cong. Rec. 14680 (1965).

objections to the membership focus of S. 2187.[40] McClellan acknowledged the force of Katzenbach's testimony.[41] Senator McClellan, therefore, abandoned his membership approach in S. 2187 and adopted the "conduct" approach of RICO. As Professor Michael Goldsmith observed, "[B]y focusing more on conduct, [Senator McClellan in] RICO sought to rectify the constitutional problems raised by S. 2187."[42]

3. S. 2048, S. 2049, S. 1623, the 1967 and 1969 legislation, were targeted at licit enterprises.

While Senator McClellan's legislative efforts focused on enterprise criminality in the underworld, Senator Hruska introduced legislation focused on a separate, but related problem: the infiltration of legitimate business in the upperworld by organized crime. In 1967, Senator Hruska introduced S. 2048 and S. 2049.[43] These two bills were RICO's other key precursors. S. 2048 proposed amendments to the Sherman Act that would have outlawed the investing of unreported income "in any *business* enterprise" and using the "income to establish or operate . . . such . . . *business* enterprise." (emphasis supplied). "Business" was not a word of limitation in Senator McClellan's earlier syndicate bill; it would be dropped later

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[40] *Criminal Law and Procedures*, Hearings on S. 2187 *et al.* before the Subcomm. on Crim. Laws and Proc. of the Sen. Comm. on the Judiciary, 89th Cong., 2d Sess. 31-32 (1966). The Committee on Federal Legislation of the Association of the Bar of the City of New York raised similar objections. *Id.* at 306-07 (citing the Smith Act (18 U.S.C. §2385) prosecutions in *Scales v. United States*, 367 U.S. 203 (1961), and *Yates v. United States*, 354 U.S. 298 (1957)).

[41] *Id.* at 37. During the House debate, Congressman Richard Poff, a key House sponsor, expressly recognized the First Amendment issues raised by criminalizing Mafia "membership," specifically citing Katzenbach's testimony on S. 2187. 116 Cong. Rec. 35344 (1970).

[42] *Goldsmith* at 783 & nn.70-72.

[43] S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); S. 2049, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); 113 Cong. Rec. 17997-18002 (1967).

when the bills were integrated. Drafted to supplement S. 2048, S. 2049 would have made it illegal for principals in certain specified crimes to invest income from those crimes in "any business enterprise." The predicate offenses were characteristic of organized crime, not white-collar crime, much less political or social protest.[44] Congressman Richard Poff introduced companion bills to S. 2048 and S. 2049 in the House.[45] No action was taken on these bills, but they were studied by the American Bar Association.[46]

In the 91st Congress, Senator Hruska introduced a new bill, S. 1623, "The Criminal Activity Profits Act", that reflected elements from S. 2048 and S. 2049.[47] Once again, Senator Hruska explained that the focus of his bill was on offenses characteristic of organized crime, not white-collar crime or political or social protest.[48] S. 1623 included in its

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[44] In introducing S. 2048 and S. 2049, Senator Hruska stated:

> The second bill, S. 2049, would prohibit the investment in legitimate business enterprises of income derived from specified criminal activity – *especially those criminal activities engaged in by members of organized crime families* such as gambling, bribery, narcotics, extortion and the like.

113 Cong. Rec. 17999 (1967) (emphasis supplied).

[45] H.R. 11266 and H.R. 11268, 90th Cong., 1st Sess (1967); 113 Cong. Rec. 17946, 17976 (1967). In introducing his bills, Congressman Poff stated:

> [t]he first bill would outlaw the investment of income derived from specified criminal activities in legitimate business. The activities specified are those *typical of syndicate conduct*. They include gambling, bribery, extortion, counterfeiting, narcotics traffic, and white slavery.

113 Cong. Rec. 17947 (1967) (emphasis supplied).

[46] *See Basic Concepts* 1016-17 (analysis of Bar Association recommendations).

[47] S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6992-96 (1969).

[48] In introducing S. 1623, Senator Hruska stated:

> In the 90th Congress I sponsored two bills, S. 2048 and S. 2049 which were essentially similar to the bill I introduce

definition of "criminal activity" many, but not all of the offenses that would be later incorporated in RICO.[49]

4. S. 30, The Organized Crime Control Act, was a comprehensive approach to enterprise criminality.

On January 15, 1969, Senators McClellan and Hruska introduced S. 30, "The Organized Crime Control Act."[50] As introduced, S. 30 did not include RICO-type provisions. RICO was later incorporated into S. 30 as Title IX.

5. S. 1861, the 1969 legislation, was targeted at licit and illicit enterprises.

Senators McClellan and Hruska merged their two independent, but complementary approaches to "enterprise criminality" – in the underworld and in the upperworld – when they

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> today. * * * The bill is a synthesis of both of those bills, incorporating all of their features into a unified whole. It attacks the economic power of *organized crime* and its exercise of unfair competition with honest businessmen on two fronts – criminal and civil . . . .
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> Last year, . . . the American Bar Association examined the two earlier bills, S. 2048 and S. 2049, and endorsed the principles and objectives of both. * * * As a result of the ABA recommendation [to enact the bills outside of the antitrust statutes], the single new bill has been drafted as an amendment to title 18 of the United States Code with self-contained enforcement and discovery procedures.
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> 115 Cong. Rec. 6993 (1969) (emphasis supplied).

[49] *See* S. 1623, 91st Cong., 1st Sess. §2(1) (1969); 115 Cong. Rec. 6995 (1969).

[50] S. 30, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 769 (1969). *See generally Measures Relating to Organized Crime*: Hearings on S. 30, S. 994, Before the Subcomm. on Crim. Laws and Proc. of the Sen. Comm. on the Judiciary, 91st Cong., 1st Sess. 4-29 (1969) ("Senate Hearings"); *Organized Crime Control*, Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) ("House Hearings").

cosponsored S. 1861, "The Corrupt Organizations Act," which was introduced on April 18, 1969.[51] S. 1861 combined McClellan's concern with underworld organizations with Hruska's concern with infiltration of legitimate business. Senator McClellan explained that the focus of the legislation was on the various methods of "organized crime."[52] S. 1861 also dropped the word "business" from the phrase "business enterprise" in S. 1623, RICO's predecessor legislation, not to *eliminate* its commercial dimension, but to *expand* its scope beyond *legitimate* businesses to *illegitimate* enterprises.[53]

The introductory language of S. 1861 was similar to the introductory language of S. 30, which, in turn, was derived from Senator McClellan's 1965 legislation, S. 2187.[54] S. 1861 was incorporated into S. 30 as Title IX (RICO).[55] When S. 1861 was incorporated into S. 30, and reported out of the Judiciary Committee, the "predicate crimes associated with white-collar activity were [also] added to the text."[56] Accordingly, the scope of RICO as applying to white-collar crime as well as organized crime was perfected.

The scope of the remedial features of RICO was shaped in the House. S. 1623, as introduced, contained not only criminal penalties but also private antitrust-type civil

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[51] S. 1861, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 9566 (1969).

[52] 115 Cong. Rec. 9567 (1969).

[53] *Goldsmith* at 780. This change is confirmed by the Senate Report, which states that §1961 "defines 'enterprise' to include associations in fact, as well as legally recognized associative entities." *S. Rep.* 617 at 158. Petitioners simply misread this change. (Pet. Br. 22, 29, and 34-35) The Government misses the point because it begins its legislative history after the relevant developments had occurred. (Gov. Br. 16-17).

[54] 115 Cong. Rec. 9568 (1969).

[55] *Senate Report* at 83. The incorporation of S. 1861 into S. 30 was anticipated by Senator McClellan when he introduced the bill: "Its provisions might well be incorporated by way of amendment into S. 30 itself." 115 Cong. Rec. 9567 (1969).

[56] *Goldsmith* at 787; 264 n.78; 268-79.

remedies.[57] Nevertheless, S. 1861, as introduced and as incorporated into S. 30, was silent on a private claim for relief.[58] While S. 30 was pending in the House, the American Bar Association endorsed it, making suggestions, including a private treble damage claim for relief "based upon the concept of Section 4 of the Clayton Act."[59] Senator McClellan termed the suggestion "constructive,"[60] and it was incorporated into the bill as it was passed by the House,[61] was accepted by the Senate,[62] and was signed by the President.[63]

Nothing in these legislative developments reflects an intent on the part of RICO's sponsors, in the Senate or House, to permit the statute to be applicable, beyond its antitrust counterparts, to political or social protest. The final text of RICO joined themes of combatting organized crime and other syndicated activity as well as the infiltration of legitimate entities by criminal groups. Investment, takeover, and operation were prohibited; the objective was a marketplace, not only free, but characterized by integrity. To circumvent the membership problem, RICO focused, not on joining a group, but on participating in its affairs through a pattern of criminal conduct. The criminal activities included in the statute were characteristic of organized and white-collar crime, not political or social protest. The remedies, too, were principally

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[57] S. 1623, 91st Cong., 1st Sess. §§ 3, 4 (1969). The American Bar Association endorsed the private enforcement mechanism of RICO in the *Senate Hearing* at 558.

[58] *See Civil Action* at 262 n.71.

[59] *House Hearings* at 534-44 (statement of Edward L. Wright, President of the American Bar Association).

[60] 116 Cong. Rec. 25190 (1970). Other Senators also endorsed the private enforcement mechanism. 116 Cong. Rec. 36296 (1970) (statement of Sen. Dole).

[61] *Id.* at 35363.

[62] *Id.* at 36296-64.

[63] *Id.* at 37264. The President called for civil remedies, including the treble damage provisions, when he endorsed S. 30 in his Message on Organized Crime, *reprinted in, Senate Hearings* at 449.

economic (forfeiture, treble damages for injury to business or property, etc.). Accordingly, it would be beyond congressional authorization if RICO were now applied to curtail political or social protest.

6. The scope of "racketeering activity" included white-collar crime but excluded political or social protest.

The principal of selection used to include the predicate offenses in RICO provides further confirmation of the statute's commercial or "gain" dimension. When a subset is selected from a set, much can be learned about the character of the subset by examining the set itself. So, too, with RICO. Its legislative history demonstrates two movements. One direction narrowed the predicate offenses to *exclude* political or social demonstrations; the other enlarged the predicate offenses to *include* white-collar crime.[64] *See Russello*, 464 U.S. at 23.

The predicate offenses included in Title IX were narrowed from earlier bills. As originally introduced, S. 1861 defined "racketeering activity" to include "any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year . . . . "[65] Two objections were raised to this definition. The Department of Justice opposed it because of its indeterminate breadth and on the grounds of federalism.[66] The Department suggested an amendment to narrow the definition to specified offenses "customarily invoked against organized crime." *Id.* at 122. This suggestion was adopted by RICO's sponsors.

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[64] *See Senate Report* at 83 ("Clarifying, limiting, and expanding amendments have been made . . . . ").

[65] S. 1861, 91st Cong., 1st Sess. §2(a) (1969); 115 Cong. Rec. 9569 (1969).

[66] Letter from Richard G. Kleindienst, Deputy Attorney General of August 11, 1969, *reprinted in*, *Senate Report* at 121-26.

On the other hand, the American Civil Liberties Union ("ACLU") opposed the breadth of S. 30 because of a perceived threat to political or social demonstrations. It testified against the sentencing provisions of S. 30 in the Senate hearings.[67] The ACLU also testified against the breadth of the original definition of "racketeering activity," which it found "particularly troublesome."[68] The ACLU cited the potential impact of S. 1861 on "the campus disorders which racked Columbia University a year ago April."[69]

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[67] The ACLU testified:

> While it is required that conduct constituting more than one crime as part of a continuing course of activity to be engaged in or caused by one or more of the conspirators to effect the objective of the conspiratorial relationship, it is not clear, in addition to the other ambiguities encompassed in that provision, whether a conviction must have been obtained for the one or more crimes. The language is so broad that it could be regarded as including, in addition to the Mafia or other narcotics or gambling syndicates, a labor strike, a civil rights demonstration or Klan march, an anti-war or pro-war demonstration, or a campus demonstration or counter-demonstration which was expected and planned to result in some sense in a series of crimes (e.g., mass trespass or violation of a parade ordinance) even though the statute or regulation that was the basis of the "crime" is invalid either on its face or as applied.

Senate Hearings at 472 (statement of Lawrence Speiser).

[68] The ACLU testified:

> Last year's massive anti-war demonstration at the Pentagon resulted in a number of arrests for acts involving the danger of violence to life, limb or property indictable under state or federal law and punishable by imprisonment for more than one year . . . offenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill . . . .

Id. at 475-76 (statement of Lawrence Speiser).

[69] The ACLU testified:

> This was a group activity which resulted in arrests, involved the danger of violence to property, and involved offenses for

In response, the Senate Judiciary Committee, adopted two amendments to RICO. First, when the Committee incorporated S. 1861 into S. 30 as Title IX, it eliminated one aspect of the broad definition of "racketeering activity" ("danger of violence to life, limb or property") and replaced it, as the Department of Justice suggested, with specifically designated state offenses. Significantly, when the Senate debated the 1970 Act, the ACLU continued to oppose Title X (sentencing), but it favorably noted the responsive changes in Title IX (RICO).[70]

Second, the Senate Judiciary Committee, expanded the specific federal offenses to include offenses characteristic of white-collar crime, an amendment suggested by the Securities and Exchange Commission.[71] Accordingly, between the introduction of S. 1861, its incorporation into Title IX, and the reporting of the combined bills to the Senate,[72] the Judiciary

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> which imprisonment for more than a year was possible. Under S. 1861, Mr. [James Simon] Kunen [author of "Strawberry Statement," describing his participation in the campus disorders] could not lawfully invest any of the proceeds from his book. Whatever one may think of the offenses or the offenders in these hypotheticals, and questions of whether or not their activity is in any way protected by constitutional guarantees aside, it is clear that this proposed legislation is in no way intended to subject them to the penalties described. Nevertheless, there is absolutely nothing in the bill to prevent them from being so used.

Id. at 476.

[70] "The substantive provisions of Title IX have been substantially revised so as to eliminate most of the previously objectionable features." 116 Cong. Rec. 854 (1970) (ACLU statement put into the record by Sen. Young).

[71] *Report of the Ad Hoc Civil RICO Task Force*; A.B.A. Sec. Corp. Banking & Bus. L. at 99-100 n.130 (1985).

[72] *Senate Report* at 21-22. As amended by the Committee, the Statement of Finding and Purpose expressly mentions "fraud," and "racketeering activity" includes mail fraud, wire fraud, transportation fraud, bankruptcy fraud, and securities fraud. *See Civil Action* at 268.

Committee *expanded* "racketeering activity" beyond the subset of offenses included in the Penal Reform Commission proposal to include white-collar offenses,[73] and, in response to the concern of the ACLU, *narrowed* the subset of offenses to preclude its application to political or social protest. As reported, RICO was an attack on the commercial activities of organized crime and white-collar crime but not political or social protest.

Senator McClellan commented on the predicate offenses at a later point. Significantly, he explained the rationale of RICO, indicating that the principle of selection for the predicate offenses was "commercial exploitation."[74] In particular, the Bar Association of the City of New York had attacked RICO, then Title IX, objecting to the Senate Report that said the predicate offenses were offenses "characteristically violated by members of organized crime."[75] The Bar Committee complained that the subset was too inclusive, because it included offenses that were committed by persons not engaged in organized crime. Senator McClellan responded to the Bar Committee, and to other objections of the ACLU, in an address after passage in the Senate but while RICO was pending in the House:[76]

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[73] *See supra* n.47.

[74] 116 Cong. Rec. 18940 (1970).

[75] The *Senate Report* described "racketeering activity" as "includ[ing] crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations." *Senate Report* at 158.

[76] 116 Cong. Rec. 18940 (1970) (emphasis supplied). *See also McClellan* at 142-43. This same characterization of the predicate offenses is repeatedly made by RICO's sponsors. " 'Racketeering activity' is defined in terms of specific State and Federal criminal statutes now characteristically violated by participants in organized crime." *House Hearings* at 85 (memorandum of Sen. McClellan of May 20, 1970); " 'Racketeering activity' is defined to include a wide variety of crimes, both State and Federal, that are generally associated with organized crime." 116 Cong. Rec. 35295 (statement of Cong. Poff). Sponsors comments are entitled to "weight." *Lewis v. United States*, 445 U.S. 55, 63 (1980). When a sponsor inserts a memorandum in the legislative history, it becomes a "weighty gloss" on the statute. *Galvan v. Press*, 347 U.S. 522, 527 (1954).

> The Senate report does not claim . . . . that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to *organized commercial exploitation*, unlike some other offenses such as rape, and experience has shown they commonly are committed by participants in organized crime.
>
> * * *
>
> It is impossible to draw an effective statute which reaches most of the *commercial* activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well . . . .
>
> It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected, . . . it lists offenses committed by organized crime with substantial frequency, as part of its *commercial* operations (emphasis supplied).

Senator McClellan's point was repeated in a law review article, which was published during the consideration of the bill by the House:

> Since the purpose of Title IX is *economic*, it would be pointless surplusage for it to cover crimes which are not adapted to *commercial exploitation*.

McClellan at 161-62 (emphasis supplied).[77] Thus, McClellan explained the criterion by which the predicate acts were selected for inclusion in RICO: they were those that lent themselves to commercial exploitation.[78]

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[77] Significantly, Senator McClellan's article was cited as an authoritative interpretation of RICO by Congressman Poff, during the House debate. 116 Cong. Rec. 35298 (1970).

[78] The commercial character of RICO is confirmed by the Senate Report:

> Title IX thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of

Congress's understanding that political and social protest was excluded from RICO may also be seen by comparing the scope of Title IX (RICO) with Title X (Dangerous Special Offender Sentencing). Title IX's application is limited by a specific list of designated crimes. Title X, however, was made applicable to all "felonies".[79]

During Senate debate, Senator Edward Kennedy objected to Title X, expressing concern that anti-war protestors, such as "Dr. [Benjamin] Spock," might be "subjected to special sentencing."[80] He proposed to amend Title X to make its application limited "to those convicted of the crimes" designated in Title IX of RICO.[81] Kennedy argued that Title X's scope ("any felony") would extend it to anti-war protesters, such as Dr. Spock or to policemen who violate civil rights.[82] To exclude such individuals from Title X, Senator Kennedy proposed an amendment to limit Title X to the specified offenses in Title IX, by substituting for "any felony" in Title

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> civil remedies . . . . * * * Nevertheless, it must be emphasized that these remedies are not exclusive, and that *title IX seeks essentially an economic, not a punitive goal.* However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities . . . .

Senate Report at 81 (emphasis supplied).

[79] Title X was codified at 18 U.S.C. §3575. It was repealed by Pub. L. 98-473, Title II, chapter II, §212(a)(2) (1984), 98 Stat. 1987 (1984).

[80] 116 Cong. Rec. 845 (1970). Dr. Benjamin Spock was convicted of conspiring to violate the Selective Service Act by staging sit-ins at armed services recruitment centers, draft card burnings, and demonstrations, but his conviction was reversed on appeal and remanded for a new trial. *United States v. Spock*, 416 F.2d 165, 168 & n.2 (1st Cir. 1969). Dr. Spock's anti-war conduct closely parallels the allegations against Respondents: sit-ins, demonstrations, and press conferences, mass surrenders of draft cards, and card burnings.

[81] 116 Cong. Rec. 845 (1970).

[82] The ACLU expressed the same concern about Title X:

> In addition to organized crime cases, this provision might be read as applying to civil rights activists or political demonstrators (where a pattern of "criminal" conduct might be a series of technical trespasses). The Dr. Spock case and the pending case of the Chicago 7 come to mind.

116 Cong. Rec. 855 (1970) (ACLU statement introduced by Senator Young).

X the list of offenses in Title IX. *Id.* at 845-46. In response, Senator McClellan argued for making Title X applicable to "any felony," and he objected to limiting Title X to offenses specified in Title IX. *Id.* at 846. "It seems to me," Senator McClellan argued, "that it would be a grave mistake to restrict dangerous offender sentencing to any list of specified offenses supposedly typical of organized crime." *Id.* at 845. Senator Kennedy's amendment failed to pass. *Id.* at 849.

Obviously, this exchange demonstrates an informed judgment of Senators McClellan and Kennedy that Title IX would not include Dr. Spock, that is, Title IX did not apply to political or social protest. Senators Kennedy and McClellan thought that if Title X were limited to the specific list of offenses in Title IX, Dr. Spock would be excluded from Title X. Accordingly, the intent of the key sponsor of RICO, Senator McClellan, not to have it applicable to political or social protest was made clear.[83]

7. Coercion under state law and riot under 18 U.S.C. §2101 were omitted.

The principle of selection used to *exclude* certain offenses from RICO provides further confirmation of the statutes commercial dimension. Had Senators McClellan or Hruska wanted to make RICO applicable to political or social protests, they had only to add "coercion" to the list of state offenses or 18 U.S.C. §2101 (riot) to the list of federal offenses. *See Turkette*, 452 U.S. at 581. Since neither is in the predicate offenses, neither ought now to be added by interpretation. *See Tafflin*, 493 U.S. at 462.

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[83] The isolated comment in the House debates that RICO might apply to some undefined "counter-revolutionary activity" is entitled to little weight. 116 Cong. Rec. 35326 (1970) (stat. of Cong. Rarich) It is not the informed commentary of a sponsor. *S & E Contractors v. United States*, 406 U.S. 1, 13 n.9 (1972).

a. Coercion.

"Coercion" was unknown to the common law.[84] Since the Model Penal Code of 1962, however, the distinction between "extortion," a common law offense, and "coercion," a statutory innovation, is increasingly reflected in state law.[85]

Extortion, not coercion, was incorporated into the state offenses under RICO.[86] Had Congress wanted to reach

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[84] *See, e.g., State v. Ullman*, 5 Minn. 1, 2 (1861).

[85] *See* Model Penal Code §212.5 "Criminal Coercion" (Official Draft 1962) ("to restrict another's freedom of action . . . he threatens . . .); *id.* §223.4 "Theft by Extortion" ("obtains property by another by threatening . . .) *See generally*, Kadish, *The Model Penal Code's Historical Antecedents*, 19 Rutgers L.J. 521, 538 (1988):

> The Model Penal Code has become . . . the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes . . . . * * * The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes . . . .

The *Model Penal Code and Commentaries* §223.4 at 203 (1980) observes:

> [B]ehavior prohibited by this section [theft by extortion] is closely analogous to that proscribed as criminal coercion under Section 212.5. * * * The major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment.' while extortion is included within the consolidated offense of theft because it is restricted to one who 'obtains property of another by' threats.

Commentaries, id. at §212.5 at 266, explains:

> It is arguable that these categories of threat [theft by extortion] should be included in the offense of criminal coercion. . . . The judgment underlying the Model Code, however, is that the underlying wrong in extortion – obtaining property to which the actor knows he is not entitled – provides a more reliable basis for punishment than does the Section 212.5 requirement of a 'purpose unlawfully to restrict another's freedom of action to his detriment.'

[86] *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1129-39 (E.D.N.Y. 1992) (Glasser, J.) (coercion not within RICO) ("the distinction is not trivial . . . . [I]t is of the essence of extortion – not only in New York law but more importantly, in the law generally – that one compel another

political and social protest, it had only to add "coercion."[87]

b. 18 U.S.C. §2101 (riot).

18 U.S.C. §2101 is conspicuous by its absence from the list of predicate federal offenses.[88] The omission of the anti-riot provisions of Section 2101 in RICO is crucial in light of the roles played in the enactment of Section 2101 by Senators McClellan and Hruska, the two principal sponsors of RICO in the Senate. Both were aware of the statute. Had either wanted RICO to cover illegal demonstrations, it would have taken little effort to add Section 2101 to the list of predicate federal offenses.

Between November 1967 and August 1969, Senator McClellan, as chairman of the Senate Permanent Subcommittee on Investigation, held 71 days of hearings on riots and

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to surrender property."); *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 231-33 (S.D.N.Y. 1992) (Motley, J.) ("coercion . . . not among . . . laws . . . providing a basis for RICO liability"); *cf. United States v. Nardello*, 393 U.S. 286, 296 (1969) ("a type of activity generally known as extortionate since money was to be obtained from the victim by virtue of fear"); *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) ("conventional definition of extortion . . . obtaining of property from another- . . . by . . . fear").

[87] Respondents adopt the argument of Respondent Terry *et al.* that "extortion" under the Hobbs Act (18 U.S.C. §1951) was not pled and inculpating facts were not set out in the RICO Case Statement by Petitioners. Respondents did not "obtain the property" of Petitioners. See text *supra* at 6.

[88] 18 U.S.C. §2101(a)(1), in pertinent part, provides:

> Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce . . . . with intent –
> (A) to incite a riot . . .
> Shall be fined not more than $10,000 . . . .

18 U.S.C. §2102(a), in pertinent part, provides:

> As used in this chapter, the term "riot" means a public disturbance involving . . . an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual . . . .

other civil disorders.[89] After H.R. 421 passed the House, the Senate Judiciary Committee held 13 days of hearings on it. H.R. 421 was the legislation that first proposed adding Section 2101 to Title 18.[90] Senators McClellan and Hruska each chaired a day of those hearings.[91] Senator Hruska spoke on the floor[92] in favor of the amendment to the Civil Right Act of 1968[93] that added Section 2101 to Title 18.[94] Senators McClellan and Hruska also voted for the amendment.[95] Accordingly, Senators McClellan and Hruska were aware of the issue (civil disturbances) and the law (18 U.S.C. §2101) when RICO was drafted and enacted. Repeatedly, Senator McClellan referred to his own investigations into organized crime, labor racketeering, narcotics, and gambling, when he reported S. 30 to the Senate[96] and spoke in favor of the bill on the Senate floor.[97] McClellan and Hruska, however, do not mention civil disturbances in speaking in favor of S. 30 or Title IX. McClellan does not refer to his work in investigating civil disturbances, and neither McClellan nor Hruska refers to his efforts in processing 18 U.S.C. §2101. Had either wanted to include political or social protest, rather than to exclude it, there is no doubt that they knew how to speak their minds. *See Sedima*, 473 U.S. at 489.[98] Twisting RICO to make it

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[89] *Riots, Civil and Criminal Disorder*; Hearings before the Sen. Permanent Subcomm. on Investigations of the Comm. on Government Operations, 90th and 91st Cong., 1st and 2nd Sess., Parts 1-23 (1967-1969).

[90] H.R. 421, 90th Cong., 1st Sess. (1967); *Anti-Riot Bill 1967*: Hearings before the Comm. on the Jud., 90th Cong., 1st Sess. Parts 1 & 2 (1967).

[91] *Id.* Part 1 at 353 (August 7, 1967) (McClellan); *id.* Part 2 at 753 (August 28, 1967) (Hruska).

[92] 114 Cong. Rec. 5211 (1968) (statement of Sen. Hruska)

[93] Pub. L. 90-284, 82 Stat. 73 (1968).

[94] 114 Cong. Rec. 5033 (1968).

[95] *Id.* at 5214 (1968) (the amendment passed 82 to 13).

[96] *Senate Report* at 76-78.

[97] 116 Cong. Rec. 585 (1970).

[98] *See also* Title XI of S. 30, 84 Stat. 952-60 (1970), which enacted Chapter 40, Importation Manufacture, Distribution and Storage of Explosive Materials (18 U.S.C. §841 *et seq.*). The crimes enacted in Title XI were not

applicable to political and social protests beyond the intent of its principal sponsors is rewriting, not interpreting RICO, "a job for Congress . . . not this court." *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 495).

C. RICO must be read *in pari materia* with the antitrust statutes to exclude political and social protest.

Congress does not draft criminal legislation on a clean slate. It crafts it against a history – continuous, uniform, and intact – of a well-settled presupposition that established legal defenses or exclusions will be read into such legislation in the absence of a contrary, clear statement.[99] Those defenses or exclusions are principally, but not exclusively, defenses or exclusions stemming from our nation's common law background.[100]

Federal criminal legislation is often silent, for example, on the crucial defense of lack of state of mind, yet a state of mind defense is implied in federal criminal legislation under a fairly complex, but well-established body of jurisprudence.[101]

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included in the list in Title IX (RICO). Title XI was "prompted" for inclusion in the legislation "by the national emergency of criminal bombings brought into dramatic focus by the recent tragedy at the University of Wisconsin" 116 Cong. Rec. 35201 (1970) (statement of Cong. Poff). Not including the new offenses in Title IX was consistent with the desire not to have RICO applicable to political or social protest. *Russello*, 464 U.S. at 23.

[99] *See, e.g., Eastern Railroad Pres. Conference v. Noerr Motor Frgt., Inc.*, 365 U.S. 127, 138 (1961) (exclusion) ("not lightly impute to Congress intent to invade [constitutional] freedoms"); *Parker v. Brown*, 317 U.S. 341, 351 (1943) (exclusion) (intent to have Sherman Act applicable to state action not lightly attributable to Congress).

[100] *See, e.g., United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) (defense of duress or necessity) ("legislates against a background of Anglo-Saxon common law"); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (defense of lack of state of mind) ("Congress . . . presumably knows and adopts the cluster of ideas . . . attached to each borrowed word").

[101] *United States v. Balint*, 258 U.S. 250, 251-52 (1922) (if regulatory and silent, strict); *Morissette v. United States*, 342 U.S. 246, 251 (1952) (if

Typically, too, other defenses or exclusions are implied in federal criminal legislation: insanity,[102] intoxication,[103] exercise of public authority,[104] and protection of persons[105] – all to the text of murder statutes[106] – as well as duress,[107] protection of property,[108] entrapment,[109] and official misstatement of law[110] into other statutes. The practice of implying such defenses or exclusions into federal criminal legislation

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common law and silent, state of mind implied); *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (elements of jurisdictional significance only, strict); *United States v. Bailey*, 444 U.S. 394, 415 (1980) (implication of state of mind for each element of offense must be considered separately).

Petitioners concede (Pet. Br. 43) that state of mind is "inherent" in RICO, that is, not expressed on the face of its operative text, but an element of the statute. They provide, however, no principled rationale for recognizing an implied state of mind, while disregarding any other well-established defense or exclusion.

[102] *Compare Davis v. United States*, 165 U.S. 373, 378 (1897) (insanity defense recognized to murder prosecution) *with* 18 U.S.C. §17 (codification of insanity defense following assassination attempt of President).

[103] *Tucker v. United States*, 151 U.S. 164, 170 (1894) (intoxication defense recognized in murder prosecution).

[104] *United States v. Clark*, 31 F. 710 (C.C. S.D. Mich 1887) (officer may take life of prisoner to prevent escape).

[105] *Beard v. United States*, 158 U.S. 550, 563-64 (1895) (retreat outside of dwelling house not required to protect self against great bodily harm).

[106] *See* 18 U.S.C. §1111(A) for the current version of the general federal murder statute, whose text contains no express defenses.

[107] *Iva Ikuko Toguri D'Aguino v. United States*, 192 F.2d 338, 358 (9th Cir. 1951) ("Tokyo Rose" prosecution) (duress recognized as defense to treason), *cert. denied*, 343 U.S. 935 (1952). *See also United States v. Bailey*, 444 U.S. 394, 415 (1980) (duress and necessity recognized for escape prosecution).

[108] *McNabb v. United States*, 123 F.2d 848, 854 (6th Cir. 1941) (person may defend property short of taking life), *rev'd on other grounds*, 318 U.S. 332 (1943).

[109] *Sorrells v. United States*, 287 U.S. 435, 443 (1932) (implied exclusion to federal statutes).

[110] *See United States v. Laub*, 385 U.S. 475, 487 (1967) ("may not be punished for action undertaken in good faith reliance upon authoritative assurance that punishment will not attach").

began during the earliest period of our nation's history.[111] Should that practice be abandoned today, it would work a revolution in federal criminal jurisprudence of unparalleled scope.[112]

RICO was enacted against the background of settled antitrust jurisprudence, as this Court has repeatedly noted. *Holmes*, 112 S.Ct. at 1317. An examination of such statutes *in pari materia* is a "long standing practice."[113] The basic principle of statutory construction under the antitrust statutes is that an intent to exclude areas is to be determined, not solely "from the literal meaning of the words" of the statutes, but from "the purpose, the subject matter, the context and the legislative history of the" acts. *Parker*, 317 U.S. at 351. The

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[111] *See, e.g., The William Gray*, 29 F. Cas. 1300, 1302 (No. 17,694) (C.C. N.Y. 1810) (necessity, that is, storm, defense to violation of port embargo); *United States v. Ashton*, 24 F. Cas. 873, 874 (No. 14,470) (C.C. Mass. 1834) (Story, J.) (necessity, that is, unseaworthy vessel returned for repairs, defense to mutiny).

[112] Petitioners suggest that "racketeering activity" contains no ambiguity and leaves open no possibility that additional limitations may apply. (Pet. Br. 24) The provisions of 18 U.S.C. §§ 2251-52 (sexual exploitation of children) are "racketeering activity." 18 U.S.C. §1961(1)(B). Should this Court recognize a defense of entrapment to a RICO charge predicated on their violation? *See Jacobson v. United States*, 112 S.Ct. 1535, 1540-43 (1992) (entrapment defense applicable to unadorned text of 18 U.S.C. §2252 (a)(2)(A)).

[113] *Crawford Fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 445 (1987). The principal statutes *in pari materia* with RICO are the antitrust statutes. *Holmes*, 112 S.Ct. at 1317 (citing *Agency* 483 U.S. at 150-51; *Shearson*, 482 U.S. at 241; and *Sedima*, 473 U.S. at 489); S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 56-60 (1970). In fact, RICO and the antitrust statutes are well-integrated; they reflect related policies, which aid in construing them. *Turkette*, 452 U.S. at 590; *Russello*, 464 U.S. at 24; *Sedima* 473 U.S. at 493; *Tafflin*, 493 U.S. at 466; *Holmes*, 112 S.Ct. at 1321. The nation's commercial marketplaces must not only be free, but characterized by integrity. "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." C. Kaysen & D. Turner, *Antitrust Policy* 17 (1959); *American C & L Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J. dissenting) ("Restraint may be exerted through force or fraud or agreement.") RICO focuses on the first two; the antitrust statutes focus on the third.

antitrust statutes were "aimed primarily at combinations having *commercial* objectives," and they may be applied beyond such combinations "only to a very limited extent."[114] In particular, the antitrust statutes evince "a purpose to regulate . . . business activity . . . [,not] political activity, a purpose which would have no basis whatever in the legislative histor[ies]" of the statutes. *Noerr*, 365 U.S. at 137. Any other construction of the statutes would "raise important constitutional questions," *id.* at 138, an intent not "lightly imputed to Congress." *Id.* "The proscriptions of the . . . [statutes], tailored as they are for the *business* world, are not at all appropriate for application in the *political* arena."[115]

When Senator McClellan introduced one of RICO's key precursors, S. 1861, he stated:

> The bill draws heavily upon the remedies developed in the field of antitrust . . . There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. *Nor is*

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[114] *Klor's Inc. v. Broadway-Hale Store, Inc.*, 359 U.S. 207, 213 n.7 (1959) (emphasis supplied).

[115] *Id.* at 141 (emphasis supplied). *Noerr* also held that the antitrust statutes do not reach activities that are political "simply because those activities have a commercial impact . . . . " *Id.* This aspect of *Noerr* disposes of one aspect (gain, not loss) of Petitioners' argument that RICO's "economic dimension" may be met by a showing of impact to Petitioners (loss) rather than benefit to Respondents (gain) or other benefit to Respondents not proximately related to "racketeering activity." (Pet. Br. 11, 29-32, 45-48). The other aspect (benefit not derived from Petitioners) ought also to be moot, since Petitioners have abandoned their §1962(a) claim (*id.* at 4 n.1), and rightly so, in light of *Hemmings v. Barian*, 822 F.2d 688, 692 (7th Cir. 1987) and *Holmes*, 112 S.Ct. at 1318. *See* 968 F.2d at 623-25.

The *Noerr* exclusion is statutory in character. 365 U.S. at 145 ("Act was not violated . . . . ") Accordingly, the conduct need not be protected by the First Amendment to come within the exclusion. Indeed, if it did, the exclusion itself would be unnecessary, for no statute may prohibit conduct constitutionally protected. *See also United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1317-18 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (*Noerr-Pennington* Doctrine not modified or limited by subsequent cases; boycott excluded from statute, even though it had the commercial effect of a trade restraint.).

there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.[116]

As it is "always appropriate to assume that our elected representatives . . . know the law,"[117] the applicability to RICO – and to the conduct of Respondents – of the *Noerr-Pennington* Doctrine, which was settled antitrust jurisprudence in 1970, ought to be beyond serious argument. RICO, like the antitrust statutes, was consciously structured to apply to the marketplace – underworld or upperworld – of commercial activity, not to the arena of political or social protest. Accordingly, political or social protest is excluded from RICO.

D. Congressional action confirms that RICO has an exclusively commercial dimension.

The "views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."[118] Nevertheless, subsequent legislative developments, when they "confirm"[119] a construction of the statute are entitled to "significant weight."[120]

Efforts to "reform" RICO after this Court's decision in *Sedima* sought to curtail commercial abuse.[121] Nevertheless, other themes emerged. In 1987, Senator Howard Metzenbaum introduced legislation in the Senate[122] to circumscribe RICO's use in business litigation. In testimony on Senator Metzenbaum's legislation, the National Association of Attorneys

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[116] 115 Cong. Rec. 9567 (1969) (emphasis supplied).

[117] *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

[118] *Russello*, 464 U.S. at 26 (quoting *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 165 n.27 (1983)).

[119] *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

[120] *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

[121] *See, e.g., Oversight 1985* 243 (accounting profession), 629 (securities industry).

[122] S. 1523, 100th Cong., 1st Sess. (1987).

General, however, called for the elimination of the *Ivic-Bagaric* rule "to preserve RICO's effectiveness . . . against terrorism or other violence-prone groups."[123] In contrast, the American Civil Liberties Union expressed its concern that RICO was being used "for chilling First Amendment Rights."[124] In 1987, Congressmen John Conyers introduced legislation in the House to overturn the *Ivic-Bagaric* rule.[125] The Attorney General of Arizona supported the Conyer's bill.[126] No action was taken on either bill.

In 1989, Congressman Rick Boucher also introduced legislation to circumscribe RICO's use in routine business litigation.[127] This time the ACLU testified that the legislation was a "good beginning," but, for "more complete protection," it called for the codification of the *Ivic-Bagaric* rule "to except all politically motivated activity from RICO."[128] Senator Dennis DeConcini introduced companion legislation in the Senate.[129] Professor G. Robert Blakey supported RICO reform to curtail the abuse of RICO in the commercial fraud area, but he also called for the elimination of the *Ivic-Bagaric* rule as well as the adoption of amendments that would curtail

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[123] *Proposed RICO Reform Legislation*: Hearing before Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 89, 119 (1987).

[124] *Id.* at 316-17 ("most notable manifestation . . . has been in the abortion clinic context. • • • Unfortunately, it is not necessary for plaintiffs . . . to prevail . . . before severe damage is inflicted on the defendants. • • • In fact, the mere threat of a RICO claim . . . may be enough to preempt an organization from activities normally thought to be covered by the First Amendment . . . . ").

[125] H.R. 3240, 100th Cong., 2nd Sess. §9 (1987); 133 Cong. Rec. 3351 (1987) (statement of Rep. Conyers) (H.R. 3240 intended to "set aside" *United States v. Ivic*, 700 F.2d 51, 59-65, (2d Cir. 1983), to make possible RICO's application to "violence based conspiracies, including international terrorists organizations and domestic anti-Semitic or white hate groups.")

[126] *Id.* at 825-26.

[127] H.R. 1046, 101st Cong., 1st Sess. (1989).

[128] *Reform Act 1989* at 351.

[129] S. 438, 101st Cong., 1st Sess (1989).

demonstration related litigation abuse.[130] The DeConcini legislation was reported out of committee, but not acted on by the Senate.[131]

In 1991, Congressman William J. Hughes introduced legislation in the House that would have circumscribed RICO's use in business litigation.[132] It included language drafted to curtail RICO's use in the context of a "demonstration, assembly, protest, rally, or similar form of public

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[130] *Reform Act 1989* at 571, 576-78. Professor Blakey observed:

> The potential for litigation abuse, the impact of which may well be to chill pro-abortion or anti-abortion demonstrations, in this area is manifest. In fact, up to 30,000 individuals have been arrested throughout the nation in approximately 380 protests over the past year in connection with such demonstrations. . . . If all of those individuals became embroiled in RICO litigation in the Federal courts (30 to a suit), it would increase the number of RICO cases by a factor of three; the suits, too, would be complex conspiracy litigation. Such suits are being filed. The danger of a chill on First Amendment rights and of litigation abuse in the administration of justice in the Federal courts is not, however, RICO-specific. * * * It is not even abortion-specific. Similar demonstrations take place, for example, in peace rallies, at nuclear facilities, and at research hospitals that use animals. The Supreme Court guidelines for civil litigation in the area of free speech are, of course, fairly specific . . . . The need is, therefore, for discovery and evidence limitations and provisions that make possible early vindication of litigant and lower court abuse in First Amendment litigation. RICO reform legislation provides an appropriate vehicle for making those general changes (citations omitted).

[131] S. Rep. No. 101-269, 101st Cong., 2nd Sess. (1990). As reported, S. 438 would have amended 18 U.S.C. §1962 by adding a new subsection (e):

> (e) For purposes of this chapter, the term "racketeering activity" shall not include participation in, or the organization or support of, any non-violent demonstration, assembly, protest, rally or similar form of public speech undertaken for reasons other than economic or commercial gain or advantage, and no action may be maintained under this chapter based on such activities.

Id. at 34.

[132] H.R. 1717, 102nd Cong., 1st Sess. (1991).

speech." *Id.* §8. The legislation was supported by testimony[133] by the ACLU.[134]

When Attorney General Janet Reno took office, she directed the Civil Rights and Criminal Divisions to examine federal law to determine its applicability to access to abortion clinics.[135] The judgment of these seasoned attorneys: existing federal law was inadequate. She called for new legislation.[136]

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[133] *RICO Act Amendments Act of 1991:* Hearing before the Subcomm. of Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102nd Cong., 1st Sess. 114-16 (1991).

[134] The ACLU testified:

> Not only abortion clinic protestors are at risk. RICO applies to anti-nuclear protestors, anti-apartheid protestors, animal rights protestors, and others who occasionally have trespassed and damaged property or who publish newsletters. Historically, many anti-Vietnam war protests . . . and civil rights protestors could [have been] . . . sued under RICO . . . .

Id. at 118-19. The ACLU outlined for the Committee the adverse impact of RICO litigation on protestors. *Id.* (*Northwest Womens Center v. McMonagle*: 42 anti-abortion protestors named, none dismissed under Rule 12(b)(6), but 6 dismissed subsequently, including 1 by judgment not withstanding the verdict; $887 in actual damages, but $65,000 attorney's fees awarded; *Feminist Women's Health Center v. Roberts*: 3 accused of Civil RICO; 1 admitted bombing; 2 found not responsible for substantive violation, but responsible for conspiracy, even though association with bomber limited to lawful activity).

[135] Testimony of Attorney General Janet Reno Before The Senate Labor Committee (May 12, 1993).

[136] The Attorney General told the Committee:

> [W]e . . . [have not] been able to identify *any other federal law* that would be generally applicable to private interference with a woman's right to choose. We therefore have concluded that existing federal law is inadequate and new federal authority [is needed].

Id. at 7 (emphasis supplied).

The Attorney General's study led to the introduction of legislation in the Senate[137] and House.[138] In reliance on the Attorney General's testimony, the Senate Committee on Labor and Human Resource reported the Senate bill on July 29, 1993.[139]

"[W]isdom or unwisdom . . . is to be put aside in the process of interpreting a statute."[140] "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."[141] Manifestly, Congress knew in 1970 what it was doing, when it modeled RICO on the antitrust statutes, and focused RICO on business activity designed to produce gain, not inflict loss. It also knew what it was doing, when it narrowed drafts of RICO, when their possible application to demonstrators was criticized on First Amendment grounds. Since 1970, Congress has had ample opportunity to alter its 1970 decision, as it has considered the *Ivic-Bagaric* rule in hearings year after year. Accordingly, Petitioners seek in a judicial forum a change that they have been unable to obtain in a legislative forum. "[R]e-writing [RICO] is a job for Congress, if it is so inclined, and not for this court."[142]

E. Conclusion

Petitioners filed two complaints and two amended complaints. They conducted years of discovery. They filed a case statement. But no count of any complaint or paragraph of the case statement pled or asserted facts that met RICO's commercial dimension – gain to Respondents, not loss to Petitioners. To be sure, Petitioners did allege conspiracy – at least in conclusory fashion – and "extortion" – even though, it was their rootless version of it – against Respondents in Respondents' efforts to drive abortion clinics out of business. But

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[137] S. 636, 103rd Cong., 1st Sess. (1993).

[138] H.R. 796, 103rd Cong., 1st Sess (1993).

[139] S. Rep. No. 103-117, 103rd Cong., 1st Sess. 15 (1993).

[140] *Rubin v. United States*, 449 U.S. 424, 431 n.8 (1981) (quoting *TVA v. Hill*, 437 U.S. 151, 194 (1978)).

[141] *United States v. Rodgers*, 469 U.S. 475, 484 (1984).

[142] *H.J. Inc.*, 492 U.S. at 249 (quoting *Sedima*, 473 U.S. at 495, 498).

never did Petitioners contend that Respondents sought personal, economic gain from their actions. As a result, the District Court properly dismissed the Complaint with prejudice. So, too, the Court of Appeal affirmed. This Court should do no less.[143]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[143] Respondents adopt Respondent Timothy Murphy's argument that Petitioners failed to plead their Complaint with the specificity required by the First Amendment where a conspiracy is alleged that touches political or social activities. As such, Petitioners' claim for relief was properly dismissed with prejudice. Similarly, Respondents adopt the able arguments of Respondents Terry *et al.* on the issues of Article III and RICO standing and of Respondent Migliorino on the First Amendment.